No. 98-662

(2)

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IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1998

PEGGY NELL HART,
Petitioner,

v.

HAROLD B. O'BRIEN, FRANK MONTANA, C.T. MYRICK, JEFF STARNES, AND CARL MOTLEY,
Respondents.

On Petition for Writ of Certiorari
To the Fifth Circuit Court of Appeals

RESPONDENTS O'BRIEN AND MONTANA'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

1. Whether the existence of a fact dispute necessarily precludes interlocutory appellate review of the denial of summary judgment based on qualified immunity.

LIST OF ALL PARTIES

Petitioner:	Peggy Nell Hart
Respondents:	Harold O'Brien Frank Montana

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OPINIONS BELOW

The district court's unreported order denying Respondents' claim of qualified immunity is set out in the Appendix to the Petition at C-1. The panel opinion of the Fifth Circuit Court of Appeals, reversing the district court and rendering judgment, is reported at 127 F.3d 424 (5th Cir. 1997) and is included in the Petitioner's Appendix at A-1. The Fifth Circuit Court of Appeals' unreported denial of *en banc* reconsideration is included in the Petitioner's Appendix at B-1.

STATEMENT OF JURISDICTION

Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The rights at issue arise out of the Fourth Amendment to the United States Constitution. The statutory vehicle for Petitioner's suit is 42 U.S.C. § 1983.

STATEMENT

Petitioner Peggy Nell Hart's characterization of the facts in this case as "hotly disputed" is misleading. What follows is a synopsis of the facts which were not disputed below:

In August of 1992, an aerial drug investigation revealed a marijuana field growing in close proximity to Hart's rural residence. Respondents Harold O'Brien and Frank Montana, narcotics officers with the Texas Department of Public Safety, were assigned to investigate and the area was placed under surveillance. O'Brien learned that Hart's neighbor, David Conine, had a previous arrest on a drug-related offense.

During their two-week surveillance, various law enforcement officers observed Hart interacting with Conine. For example, she kept a horse on Conine's property and tended to Conine's animals. When her horse was injured, Hart frequently

entered Conine's trailer home for medical supplies.

Hart also appeared to have a personal relationship with Conine. Officers observed Hart watching television at his trailer home late at night and performing domestic chores, such as cooking meals for Conine and using his washer and dryer. She accompanied Conine on trips into town and they dined out together. Hart spent the night in the trailer on at least four occasions and went on at least one overnight trip with Conine during the surveillance period. Hart was present in Conine's trailer for a least part of his meeting with another known drug dealer, Jerry Benton.

On the basis of their observations, O'Brien sought a warrant for the arrest of both Conine and Hart and the search of certain property, including Conine's trailer and barn, a white house with black shutters thought to be vacant, various outbuildings, and several cars, two of which were registered to Hart. One of the affidavits supporting probable cause stated that Hart lived with Conine in the trailer home and was the wife of a known marijuana grower in the area, the latter allegation having been provided to O'Brien by a local prosecutor. These statements were later found to be incorrect. The white house with black shutters was, in fact, rented by Hart and Hart was not the same "Peggy Hart" married to the known marijuana grower.

REASONS FOR DENYING THE WRIT

I. The questions posed by Petitioner do not merit this Court's attention.

Rule 10.1 of the Rules of the Supreme Court provides that *certiorari* jurisdiction is a matter of judicial discretion, not of right, and will be granted only when there are special and compelling reasons to justify its exercise. Petitioner advances no such reason in this case, particularly in regard to the Fifth Circuit's determination that O'Brien and Montana were entitled to qualified immunity. Further, as demonstrated below, the Petitioner fails to demonstrate either that the Fifth Circuit's exercise of jurisdiction in this case was in error or that there exists any general confusion

among the courts of appeal in applying this Court's precedent. Thus, Petitioner has advanced no compelling reason justifying the exercise of *certiorari* jurisdiction, and none exist.

II. This Court's holdings in *Johnson v. Jones* and *Behrens v. Pelletier* were sufficiently clear so as not to require the additional clarification sought by Petitioner.

Hart urges this Court to grant *certiorari* claiming that there exists a general confusion among the circuit courts of appeal in the application of *Johnson v. Jones*, 515 U.S. 304 (1995), and that the Fifth Circuit's consideration of the officers' appeal in particular conflicted with the holding in *Johnson*. The officers counter that Hart's argument places undue emphasis on the differing conclusions of the courts of appeal. Any disparities in application do not reflect a need for clarification but are instead typical of the evolutionary process following the articulation of a new standard by this Court. Further, qualified immunity and the availability of interlocutory appeal are not, by their nature, questions susceptible to easy or formulaic determinations. As this Court made clear in *Johnson* and its progeny, whether or not the denial of qualified immunity may be immediately appealed depends on the circumstances of that denial.

The right to appeal a denial of qualified immunity was initially recognized in *Mitchell v. Forsyth*, 472 U.S. 511 (1985). In *Mitchell*, the Court found that the denial of qualified immunity was immediately appealable as a conclusive determination of the issue and as involving a claim of right "separable from, and collateral to, rights asserted in the action." *Mitchell*, 472 U.S. at 527, *citing Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978) *and Cohen v. Beneficial Industrial Loan Corp.* 337 U.S. 541 (1949).

The Court's holding in *Mitchell* was expressly limited to denials of qualified immunity that turn on an issue of law. *Mitchell*, 472 U.S. at 530. *Mitchell* thus provided a "tolerably clear rule," even prior to the clarification provided by *Johnson*. 15A C. WRIGHT, A. MILLER, & E. COOPER § 3911 (1992). In

Johnson, the Court was given the opportunity to further differentiate appeals involving issues of fact and law.

An order is based on an issue of fact when it determines only a question of "evidence sufficiency" or which facts a party may or may not be able to prove at trial. *Johnson*, 515 U.S. at 313. Conversely, an order is based on an issue of law when it concerns only the application of established legal principles, such as whether an official's conduct was objectively reasonable in light of clearly established law, to a given set of facts. In *Johnson*, there was no "given set of facts" because the single fact material to the defendants' "we didn't do it" defense, whether the defendants were present during the plaintiff's beating, was disputed. *Johnson*, 515 U.S. at 307-308. The *Johnson* Court concluded that the defendants presented an issue of fact or evidentiary sufficiency, rather than one of law, and declined to exercise jurisdiction. *Johnson*, 515 U.S. at 313, 319-320.

Although the language of *Johnson* may have led some courts to the erroneous conclusion that the existence of any factual dispute will preclude an immunity appeal, this misunderstanding was resolved by *Behrens v. Pelletier*, 516 U.S. 299 (1996). In *Behrens*, the Court made the common-sense observation that "denial of summary judgment often includes a determination that there are controverted issues of material fact" and explained that *Johnson* does not mean that every such denial of summary judgment is unappealable. *Behrens*, 516 U.S. at 312-313.

Under Federal Rule of Civil Procedure 56, a district court may deny a motion for summary judgment if it finds that a genuine issue of material fact remains. FED. R. CIV. P. 56(c). However, as recognized by the Fifth Circuit in other cases, a district court's decision on summary judgment involves two separate determinations: whether the fact in dispute is material and whether the dispute is genuine. *Colston v. Barnhart*, 143 F.3d 282, 284 (5th Cir. 1998). Genuineness of a dispute is measured by whether the evidence is sufficient to permit a reasonable factfinder to find for the nonmoving party and interlocutory appellate review of a district court's finding that a factual dispute is genuine thus foreclosed by the holding in *Johnson*. *Colston*, 143 F.3d 284; *Johnson*, 515 U.S. at 313 *citing Mitchell*, 472 U.S. at 530. The

question of materiality, on the other hand, is one of law. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986).

Taken together, *Mitchell*, *Johnson*, and *Behrens* provide coherent instruction for lower courts' determinations on the appealability of qualified immunity issues. Like any rule, the *Johnson* standard requires care in its application and is susceptible to abuse. Although Hart cites these concerns as reasons to grant *certiorari* in this case, she has not offered any indication that these issues have become more troublesome in the three years since they were rejected by the Court in *Johnson*. *Johnson*, 515 U.S. 318-319. Although Petitioner contends that the various courts of appeal are in "hopeless disarray" in applying *Johnson* and *Behrens*, simply noting that in some cases courts have found that they had jurisdiction to review a denial of qualified immunity while others found that they did not is too simple an analysis. A comparison of *Marshall v. Sullivan*, 105 F.3d 47 (2nd Cir. 1996), and *Tangwall v. Stuckey*, 135 F.3d 510 (7th Cir. 1998), two of the cases cited by Petitioners, is illustrative of this point.

In *Tangwall*, the district court denied an police officer's claim of qualified immunity when it found issues of material fact concerning the existence of probable cause. Citing *Behrens*, the Seventh Circuit reasoned that the mere existence of a factual dispute did not automatically foreclose an appeal of the denial of qualified immunity. *Tangwall*, 135 F.3d at 515. In holding that it had jurisdiction, the Seventh Circuit found that the factual disputes identified by the district court were immaterial to determining whether the officer's actions were objectively reasonable for purposes of qualified immunity. *Tangwall*, 135 F.3d at 516. Thus, the *Tangwall* court was not presented with the type of evidence sufficiency or "genuineness" problem found in *Johnson* and was able to determine, in light of the facts that were undisputed, the question of qualified immunity.

The existence of probable cause was also at issue in *Marshall*. In denying the police officer's claim of qualified immunity, the district court found that genuine issues of material fact precluded summary judgment on the issues of whether it was reasonable for the officer to believe that probable cause existed and whether probable cause existed in fact. *Marshall*, 105 F.3d at

54. Finding itself without jurisdiction, the Second Circuit held that the facts in dispute were both genuine and material. *Marshall*, 105 F.3d at 54. Consistent with the holdings of *Johnson* and *Behrens*, the existence of the evidence sufficiency problem precluded interlocutory appellate review.

Like the courts in *Tangwall* and *Marshall*, the Fifth Circuit's exercise of jurisdiction in this case fell within the parameters of the *Johnson* and *Behrens* holdings. Rather than mounting an improper challenge to the sufficiency of Hart's evidence on the disputed issues of fact, O'Brien and Montana challenged the materiality of those issues on appeal. As articulated by the Fifth Circuit, "the officials may argue on interlocutory appeal that, contrary to the district court's judgment, enough uncontested facts exist to determine that they are immune as a matter of law and that, on the basis of these facts, they are immune." *Hart*, 127 F.3d at 436; *see also Johnson v. Fankell*, 117 S. Ct. 1800, 1806 (1997) (noting that *Johnson v. Jones* allowed interlocutory appeal where the issue was whether a given set of facts showed a violation of clearly established law).[1]

In closing, there is little support for Petitioner's contention that further clarification of *Johnson* and *Behrens* is necessary to create a workable standard for interlocutory review of a denial of qualified immunity. This Court's holdings acknowledge that in some circumstances interlocutory appellate review of a denial of qualified immunity is appropriate while in other circumstances it is not. It is therefore unremarkable that the courts of appeal have exercised their jurisdiction in some cases and not in others. The Fifth Circuit's conclusion that *Johnson* and *Behrens* permitted it

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[1] See also *Lee v. Sandberg*, 136 F.3d 94 (2nd Cir. 1997) (court found that it had jurisdiction where defendants' accepted plaintiff's facts as true); *Naylor v. State of Louisiana Dept. of Corrections*, 123 F.3d 855 (5th Cir. 1997) (court lacked jurisdiction due to inadequate development of the record); *Clash v. Beatty*, 77 F.3d 1045 (7th Cir. 1996) (court lacked jurisdiction where it could not determine issue on the basis of the undisputed facts); *Chateaubriand v. Gaspard*, 97 F.3d 1218 (9th Cir. 1996) (court lacked jurisdiction to resolve factual dispute, but could address qualified immunity issue in light of the undisputed facts).

to accept jurisdiction over this case presented no conflict with the holdings of this Court. Further, any variance or disparity in the lower courts' conclusions under *Johnson* is attributable to the differing circumstances faced by those courts and does not warrant this Court's attention or further refinement of *Johnson*. The jurisdictional "quagmire" claimed by Petitioners does not exist and *certiorari* review of their claim is unnecessary.

CONCLUSION

For the foregoing reasons, the arguments presented by Petitioner in support of her request for a writ of *certiorari* are insufficient to warrant the exercise of this Court's jurisdiction. The petition for writ of *certiorari* should be denied.

Respectfully submitted,

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